

# Pick an Expert, Any Expert

## A Critique of the Expert Witness System in Construction Litigation

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Anyone who has been involved in construction litigation as a party, attorney, claims adjustor, or expert witness knows the important role played by qualified construction consultants. They will also be familiar with the difficulties presented by unqualified expert witnesses. This article addresses the problem of the "inept expert," particularly the inept engineering expert, and suggests a possible solution. In this article the authors make several references to laws and practices in California, however we believe the positions stated and conclusions drawn are applicable to all 50 states.

Construction litigation frequently involves complex engineering issues which are beyond the grasp of lay juries and judges. To address this problem, the courts permit the use of "expert witnesses." Expert witnesses in construction cases are people with appropriate expertise, often engineers, who are hired to interpret and explain the facts of the case and offer their 'disinterested' expert opinions on the culpability of the various parties. Since expert witnesses can offer opinions (other witnesses can testify only as to what they did or saw), their testimony often decides the outcome of cases. Indeed, juries may be instructed by the court that they must determine issues as to the 'standard of care' of professionals, such as engineers, based only on expert witness testimony.

Experts theoretically have no interest in the outcome of the case, and are hired to provide objective scientific opinions. However, since each party in a construction lawsuit hires its own expert witness, an adversary situation between experts is inevitably created. While

the primary purpose of the expert witness is, of course, to find the truth, it is inherent in our system that each witness presents that truth in a manner most favorable to his or her client. Juries are confronted with "dueling experts" and forced to choose between two often diametrically opposed opinions.

Because of the great weight given expert opinion by judges and juries, it is essential that experts be well-qualified to render such opinions. Obviously, the more relevant professional experience an expert witness has, the more likely is that witness to arrive at the truth in any given case.

It is the opinion of the authors that the current legal system provides insufficient protection against the "inept expert," that is, the superficially "qualified" expert who, in reality, has little or no practical experience in the particular type of project at issue. It is recommended that legislation be enacted, along with professional and ethical requirements, which will require engineers who serve as experts to demonstrate specific design and construction experience in the particular type of project involved in the litigation.

### Experts With No Expertise

Based upon our experiences and observations both as an expert structural engineering witness and as an attorney trying construction cases, it is our opinion that a great many expert witnesses hired in construction cases have in fact no particular expertise in the specialized areas of design and construction on which they opine. We have seen many situations where the major issue in a case involved the design of a specialized type of building and only one out of perhaps a

dozen structural engineering experts retained on the case had ever designed such a building. In one case, a geotechnical engineer was allowed to offer opinions on areas requiring highly specialized and sophisticated structural engineering expertise. His testimony contained serious fundamental engineering errors. In another recent trial, an engineer retained to testify concerning the standard of care on a repair project in northern California had never designed a similar project or repair, had not designed any type of building for over thirty years, and had never been licensed to practice engineering in California. Still, he was permitted to testify as an expert by the court.

In these instances, the "expert" witnesses lacked the necessary specialized training and knowledge required to offer truly valid expert opinions on the unique technical situation at issue in the case. Nonetheless, the opposing parties were required to prepare for and defeat these claims. This inadequacy in the qualifications of expert witnesses causes a tremendous waste of time and money in construction litigation which could be avoided by some common sense rules or statutes requiring basic qualifications.

The problem starts with and is, to a great degree, perpetuated by the selection method for expert witnesses. That method lacks a "filter" for ensuring some level of specialized and pertinent expertise among retained experts.

### The Expert Witness Approval Process

Near the conclusion of the litigation process (in California, fifty days prior to trial), the attorney for each party "designates" the expert witnesses he or she intends to call at trial, along with a brief outline of the areas in which each expert is expected to testify. Although opposing parties are entitled to

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object to the use of a particular expert on the grounds that the expert is unqualified, such challenges are rarely sustained. Anyone may testify as an expert who is found to have "special knowledge, skill, experience, training, or education" on the subject to which his or her testimony relates (California Evidence Code §720). In the absence of any more specific requirements, almost any licensed engineering professional will be found to be qualified. Courts generally reason that an unqualified expert will be exposed during the course of his or her testimony, and that testimony will therefore carry little weight with the jury.

Thus, while the qualifications of experts can be challenged by opposing attorneys during the fifty-day 'window' between designation and trial, in reality, such a challenge is only done effectively during trial, in front of judge or jury. As we know, however, most construction cases never go to trial—the majority are settled short of trial on the basis of discovery and deposition testimony. Thus, the opportunity to challenge the testimony of an unqualified expert never happens in most cases, and many settlements are influenced to some degree by unqualified expert testimony.

The failure of the legal system to ensure some minimum appropriate qualifications leads to massive waste and inefficiency. In many instances, a highly-qualified engineering witness with many years of experience in the specific field at issue finds his opinion being challenged by an engineer who has literally no experience in the pertinent field. Equally important, a competent practicing engineer may find himself the subject of a lawsuit for professional malpractice based solely on the testimony of an unqualified engineer. At best, this leads to a time-consuming process of depositions and mediation/settlement sessions where the qualified expert is forced to "educate" the

unqualified expert, at great cost to all parties involved. At worst, the unqualified "expert," ignorantly or knowingly, asserts an incorrect technical position, which not only wastes a great deal of (billable) time, but can also lead to an incorrect and unfair decision. The "best/worst" cases cited above assume that the unqualified expert believes what he/she testifies. Our present system also easily accommodates the unethical expert witness, the "hired gun," who will say anything for a price.

While we believe that truth (defined here as arriving at correct technical conclusions) usually predominates in the majority of construction litigation cases, at least the ones which go to trial, the cost to arrive at that truth with our present system is often so large that in reality both the plaintiff and the defendant are losers. The attorneys and expert witnesses may be the only winners.

## Recommendations

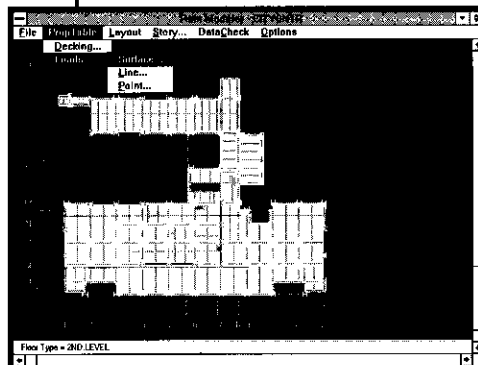
What can be done to remedy this situation? Some legal systems have recognized and solved the problem by requiring that judges hire all expert witnesses. This happens, for example, in the German civil litigation system. It happens occasionally in our country, as well. California law, for instance, gives judges the power to hire their own expert witnesses (California Evidence Code §730), but judges rarely exercise this power. Judicial selection of experts eliminates the adversary situation which invariably develops when attorneys hire expert witnesses. Cases in which the experts have been hired by a judge have been, in the authors' experience, highly efficient and fair to all parties.

It seems unlikely that our system will compel judicial selection of expert witnesses. Perhaps a more realistic proposal would be to require a minimal, objectively verifiable demonstration of pertinent

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expertise on the part of the expert witness beyond simply having a degree in engineering and an engineering license. Our system should require that expert witnesses actually have some practical qualifications in the fields in which they offer opinions.

California already has such a system in place for emergency room physicians (who evidently have a better lobby than design professionals). California Health & Safety Code §1799.110(c) provides that in any malpractice lawsuit against an emergency room physician, only physicians who have had "substantial professional experience within the last five years" while working in an emergency department may provide expert medical testimony. "Substantial experience" is determined by custom and practice in the same or similar location where the alleged negligence occurred. Because of this eminently sensible rule, no emergency room physician need fear having his or her judgment challenged by some ivory

tower theorist with a medical degree who has never faced the decisions and demands of real-life practice.

There is no reason why a similar statute could not be drafted on behalf of design professionals. The authors believe that no structural engineer can be considered an expert in any type of structure unless he/she has actually designed buildings of that type and taken legal responsibility for them as the structural engineer of record. With very few exceptions, anyone other than the designer is an observer—not a real expert. It is only by designing structures that an engineer can truly learn the codes, the design techniques, the standard practices, the construction problems, and most importantly, the expected behaviors which are associated with a particular type of structure. Thus, we recommend that expert engineering witnesses be required to demonstrate not only an appropriate educational degree and an appropriate license, but a reasonable level of demon-

strable professional design experience in the type of project at issue.

As an example, author Bondy's area of expertise is in the field of post-tensioned concrete buildings, a highly specialized area of structural engineering. We would propose, in cases where a post-tensioned concrete structure is at issue, for example, that to offer expert opinions on post-tensioned concrete an engineer must demonstrate that he/she has designed, as engineer of record, at least three post-tensioned concrete buildings which were actually built. Further, at least one of those buildings must have been built in the applicable geographic area within the last ten years preceding the engineer's testimony.

Similar modest baseline qualifications could be developed for other areas of engineering and construction expertise which are commonly debated in California construction litigation, such as seismic design, computer techniques, residential slabs-on-ground, and others.

Structural engineers opining on structures with specific materials (structural steel, reinforced concrete, wood, prestressed concrete, masonry, etc.) should be required to have designed, as the engineer of record, at least three buildings built with that material and at least one in the same or a similar locality in the preceding ten years. Licensed soils or geotechnical engineers offering opinions in soils cases must have written and signed at least three soil reports for projects with similar soil conditions, all three built within the preceding ten years prior to testimony.

The proposed law would require that a party's expert witness' disclosure statements provide these credentials to all opposing parties. Experts failing to meet these requirements would be precluded from testifying. Courts would approve or disapprove experts strictly in accordance with these minimum qualifications.



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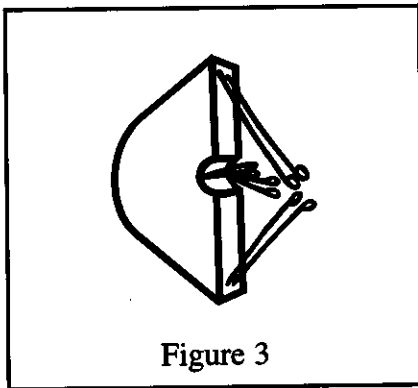


Figure 3

devices, a pier sled and a pier bolster. The half-moon shaped pier sled contains a notch for the spiral or circle tie and has four sets of integral, 16 gauge tie wires imbedded therein for ease of installation (see Figure 3). The pier bolster is disk-like in shape and contains two 9 gauge looped tie wires for installation (see Figure 4). The high-strength grout supports the weight of the concrete cage and will not shatter should the cage strike the casing or some other object. Because the sled and the bolster are tied to the cage, the possibility of them becoming detached is eliminated. The sled's shape prevents the cage from hanging on the casing. Furthermore, the sled does not protrude into the interior of the cage, so interference with the tremie is not a concern.

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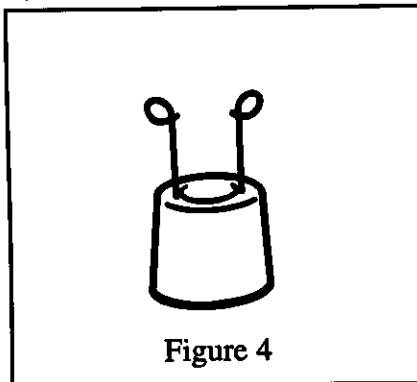


Figure 4

If enforced, we believe in California alone these requirements would save millions of dollars per year in attorneys' fees, expert witness fees, unjustified settlements, and unnecessary fees paid to experts and attorneys solely to educate or discredit unqualified experts. More importantly, perhaps, it would also greatly reduce the number of settlements and judgments which are based upon unqualified and incorrect technical opinions. It is, of course, easy to blame the legislature, the courts, and attorneys for this problem. However, design professionals are equally at fault. Design professionals have the duty to police their members and to promulgate and enforce professional and ethical standards. Professional associations and societies should take the lead in doing so. They should establish rules and guidelines for engineers acting as expert witnesses, and censure, discipline, or even expel their members for failing to

adhere to them. State licensing committees can further support the professional associations by denial or revocation of professional licenses for serious violations.

Obviously, reform of the current law will not be easy. There are some who benefit from the use of unqualified experts, and these factions will predictably oppose any reform. These include plaintiffs' attorneys who hire unqualified experts as a "hired gun" to force a settlement more favorable to the plaintiff than might be achieved if the expert were qualified. They also include defense attorneys and "defense" experts who have never met a defectively designed building they couldn't justify (or blame on someone else's client). Nonetheless, we believe that someone needs to speak up on this issue and keep it in the public eye. The waste and inefficiency in construction litigation caused by unqualified experts is massive and, to some degree, we all end up paying for it.

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